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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

JUAN FLORES-MENDEZ, an individual and
AMBER COLLINS, an individual, and on
behalf of classes of similarly situated
individuals,

Plaintiffs,

v.

ZOOSK, INC., a Delaware corporation,

Defendant.

CASE NO: 3:20-cv-04929-WHA
Assigned to Hon. William Alsup, CR 12

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS**

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL BACKGROUND	2
III.	ARGUMENT	3
A.	Plaintiffs Have Standing Under The UCL	3
B.	Plaintiffs Sufficiently Plead Both Unlawful and Unfair Conduct.....	5
1.	Zoosk’s Conduct was Unlawful.	5
2.	Zoosk’s Conduct was Unfair.....	8
C.	Plaintiff Flores-Mendez is Entitled to Monetary and Plaintiffs Are Entitled to Injunctive Relief.....	10
1.	Monetary Relief is Proper	11
2.	Injunctive Relief is Proper.....	11
IV.	CONCLUSION	12

TABLE OF AUTHORITIES

1		
2	<i>Bardin v. Daimlerchrysler Corp.</i> , 136 Cal.App.4th 1255 (Ct. App. 2006)	9
3	<i>Cappello v. Walmart Inc.</i> , 394 F. Supp. 3d 1015, 1024 (N.D. Cal. 2019)	9–10
4	<i>Fresno Motors, LLC v. Mercedes Benz USA, LLC</i> , 771 F.3d 1119, 1135 (9th Cir. 2014)	10
5	<i>In re Adobe Sys., Inc. Priv. Litig.</i> , 66 F. Supp. 3d 1197, 1227 (N.D. Cal. 2014)	8–10
6	<i>In re Anthem, Inc. Data Breach Litigation</i> , No. 15-MD-02617-LHK,	
7	2016 WL 3029783 (N.D. Cal. May 27, 2016)	4, 7, 10
8	<i>In re Facebook Privacy Litigation</i> , 572 F. App'x 494, 494 (9th Cir. 2014)	4
9	<i>In re iPhone App. Litig.</i> , 844 F. Supp. 2d 1040, 1071 (N.D. Cal. 2012)	3
10	<i>In re Marriott Int'l, Inc., Cust. Data Security Breach Litigation</i> ,	
11	440 F. Supp. 3d 447, 461 (D. Md. 2020)	4
12	<i>In re Solara Medical Supplies, LLC Customer Data Security Breach Litigation</i> ,	
13	No. 3:19-CV-2284-H-KSC, 2020 WL 2214152 (S.D. Cal. May 7, 2020)	7
14	<i>In re Yahoo! Inc. Customer Data Security Breach Litigation</i> , No. 16-MD-02752-LHK,	
15	2017 WL 3727318, at *13 (N.D. Cal. Aug. 30, 2017)	4, 8, 10, 11
16	<i>In re Zoom Video Commc'ns Inc. Priv. Litig.</i> , No. 20-CV-02155-LHK,	
17	2021 WL 930623, at *23 (N.D. Cal. Mar. 11, 2021)	8
18	<i>Jordan v. Paul Fin., LLC</i> , 745 F. Supp. 2d 1084, 1098 (N.D. Cal. 2010)	7
19	<i>Jerome's Furniture Warehouse v. Ashley Furniture Indus., Inc.</i> ,	
20	No. 20CV1765-GPC (BGS), 2021 WL 148063, at *4 (S.D. Cal. Jan. 15, 2021)	3
21	<i>Kwikset Corp. v. Superior Court</i> , 246 P.3d 877 (2011)	3
22	<i>LabMD, Inc. v. FTC</i> , 894 F.3d 1221, 1231 (11th Cir. 2018)	7–8
23	<i>Love v. First Mortg. Corp.</i> , No. EDCV 08-0060 AG (CTX),	
24	2009 WL 4980323, at *5 (C.D. Cal. Dec. 14, 2009)	7
25	<i>McCoy v. Alphabet, Inc.</i> , No. 20-cv-05427-SVK,	
26	2021 WL 405816, at *9 (N.D. Cal. Feb. 2, 2021)	4
27	<i>Svenson v. Google, Inc.</i> , 2015 WL 1503429, at *10 (N.D. Cal. Apr. 1, 2015)	9
28		

1 **I. INTRODUCTION**

2 On January 30, 2021, the Court granted in part and denied in part Defendant's, Zoosk, Inc.
 3 ("Zoosk"), motion to dismiss. ECF No. 61. In the Order, the Court noted that Plaintiffs did not allege
 4 that they lost money or property to support a cause of action under California's Unfair Competition
 5 Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (the "UCL"). ECF No. 61, at 7. Based on that lack of
 6 allegations, the Court granted dismissal of Plaintiffs' UCL claim, but also granted Plaintiffs "leave
 7 to amend with respect to all claims." ECF No. 61, at 7. On July 28, 2021, Plaintiffs filed their Second
 8 Amended Complaint ("SAC") on July 28, 2021, ECF No. 77, and out of an abundance of caution
 9 filed a Motion for Leave to Amend, ECF No. 78. On August 24, 2021, Plaintiffs corrected a
 10 scrivener's error with respect to the Second Amended Complaint. ECF No. 84.¹

11 In the SAC, Plaintiff Flores-Mendez added allegations concerning his payment for Zoosk's
 12 subscription service, SAC ¶ 3, and added a subscription subclass for all individuals whose PII was
 13 compromised in the Zoosk data breach and who also paid for subscriptions with Zoosk (the
 14 "Subscription Subclass"). SAC ¶ 63. In the amendments to the UCL claim, Plaintiffs advanced two
 15 theories. *First*, Zoosk violated the UCL's "unlawful" prong because it violated the FTC Act and
 16 failed to protect Plaintiffs' and Class Members' PII. SAC ¶ 90. *Second*, Zoosk violated the UCL's
 17 "unfair" prong because it failed to disclose the inadequate nature of the security of its computer
 18 systems and networks that stored Plaintiffs' and Class Members' PII, collected money from the
 19 Subscription Subclass and failed to commit appropriate portions of that money for security measures
 20 to protect Plaintiffs' and Class Members PII, and failed to protect Plaintiffs' and Class Members'
 21 PII. SAC ¶¶ 92–94. Because Zoosk concealed this information, Plaintiffs and Class Members could
 22 not have avoided the harm resulting from this conduct, but had that information been properly
 23 disclosed, Plaintiffs would not have used Zoosk's services. SAC ¶¶ 96–97. Through their UCL
 24 claim, Plaintiffs seek to recover restitutionary damages, as well as an injunction to enjoin Zoosk's
 25 deceptive conduct, require deletion of their PII, cease further collection of their PII, and implement
 26 adequate information security policies and practices. SAC ¶ 98.

27 _____
 28 ¹ For the avoidance of confusion, Plaintiffs' SAC paragraph references are based on ECF No. 84.

1 Zoosk now moves to dismiss Plaintiffs' UCL claim in the Second Amended Complaint. ECF
 2 No. 79 (the "Motion" or "Mot."). Zoosk chiefly argues that Plaintiffs do not have standing under
 3 the UCL, have not alleged sufficient facts to support their "unfair" and "unlawful" theories, and are
 4 not entitled to any form of relief under the UCL. For the reasons stated herein, Zoosk's arguments
 5 are unavailing and the Court should deny the Motion outright.

6 **II. FACTUAL BACKGROUND**

7 On May 11, 2020, Zoosk discovered that hackers had gained access to its networks,
 8 navigated through these networks undetected, and exfiltrated the PII of approximately 30 million
 9 consumers (the "Data Breach"). SAC ¶ 4. This PII included names, email addresses, dates of birth,
 10 demographical information, gender, gender search preferences, and password information. SAC ¶
 11 8. Zoosk did not detect nor was it aware of the breach or exfiltration until it was brought to Zoosk's
 12 attention by third parties. SAC, ¶¶ 4–6, 16.

13 Plaintiffs Juan Flores-Mendez ("Flores-Mendez") and Amber Collins ("Collins") created
 14 user profiles with Zoosk in 2015 and 2016, respectively, providing their PII to create these user
 15 profiles. SAC ¶¶ 24, 27. Zoosk's privacy policies acknowledge the sensitive nature of this
 16 information, such as race, ethnicity, sexual preferences and experiences, political affiliations,
 17 religious affiliations, and other information provided through the use of Zoosk's services. SAC ¶
 18 33. Zoosk aggregates this information with other user experiences to generate revenue and derive
 19 profits through marketing, promotions, and other business activities. SAC ¶¶ 32–36.

20 Zoosk acknowledged its duty to protect PII from unauthorized disclosure, SAC ¶ 33–35, but
 21 failed to meet its legal obligations to protect consumers' PII from unauthorized disclosure to third
 22 parties. SAC ¶¶ 37–40. Zoosk's failures permitted the Data Breach and resulting damages to
 23 Plaintiffs and class members. SAC ¶¶ 47–57. Plaintiffs have since spent time and effort mitigating
 24 the Data Breach, and due to the sensitive nature of the information involved, face a present and
 25 continuing risk of identity theft. SAC ¶¶ 24–39. Plaintiffs, on behalf of themselves and class
 26 members, now seek compensation for damages and to compel Zoosk to employ reasonable measures
 27 to protect the PII of Plaintiffs and class members still in Zoosk's possession.

1 **III. ARGUMENT**

2 Zoosk attacks Plaintiffs' UCL claim on three unavailing fronts: first, that the money Plaintiff
 3 Flores-Mendez paid for Zoosk's subscription is not a sufficient loss of money or property; second,
 4 that Zoosk's failure to protect 30 million users' PII was neither "unlawful" nor "unfair"; and third,
 5 Plaintiffs' well-plead complaint—including not only that Zoosk failed to protect the PII, but that the
 6 PII ended up for sale on the dark web and only then did Zoosk realize nefarious actors had gained
 7 unauthorized access to its unsecure computer networks—does not raise provide Plaintiffs an
 8 entitlement to either restitutionary or injunctive relief. Zoosk's motion should be denied outright.

9 **A. Plaintiffs Have Standing Under The UCL**

10 It is true that to establish standing under the UCL, a "plaintiff must show he personally lost
 11 money or property because of his own actual and reasonable reliance on the allegedly unlawful
 12 business practices." *In re iPhone App. Litig.*, 844 F. Supp. 2d 1040, 1071 (N.D. Cal. 2012) (citing
 13 *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 330, 120 Cal.Rptr.3d 741, 246 P.3d 877 (2011)).
 14 However, there are "innumerable ways in which economic injury from unfair competition may be
 15 shown." *Kwikset Corp.*, 51 Cal.4th at 323, 120 Cal.Rptr.3d 741, 246 P.3d 877. Examples include a
 16 plaintiff who "(1) surrender[s] in a transaction more, or acquire[s] in a transaction less, than he or
 17 she otherwise would have; (2) ha[s] a present or future property interest diminished; (3) [is] deprived
 18 of money or property to which he or she has a cognizable claim; or (4) [is] required to enter into a
 19 transaction, costing money or property, that would otherwise have been unnecessary." *Id.* (citation
 20 omitted). Plaintiffs' UCL claims are only under the unfair and unlawful prongs, and therefore do
 21 not sound in fraud, reliance is not at issue. *See Jerome's Furniture Warehouse v. Ashley Furniture*
 22 *Indus., Inc.*, No. 20CV1765-GPC (BGS), 2021 WL 148063, at *4 (S.D. Cal. Jan. 15, 2021).

23 First, plaintiffs who suffer a loss of their personal information have standing under the UCL.
 24 Here, Zoosk's inadequate data security permitted hackers not only unfettered access to Zoosk's
 25 systems, but those hackers also published that information to the dark web, and that publication is
 26 the reason Zoosk discovered the breach in the first place. SAC ¶ 44. And not only did Zoosk fail to
 27 secure this PII, Zoosk also uses that PII to advance and monetize its relationships with third parties.
 28 SAC ¶ 36 (Zoosk permits third party advertising networks, social media companies, and other third

1 parties to collect PII through cookies and tracking technologies which is then used for ad campaigns
 2 or sold to other businesses for advertising purposes; Zoosk shares PII with promotional partners for
 3 promotional activities; Zoosk uses PII to monitor, *improve*, and *develop* its products and services).
 4 *See In re Facebook Privacy Litig.*, 572 F. App'x 494, 494 (9th Cir. 2014) (plaintiffs plausibly alleged
 5 harm when their PII was disclosed in a data breach); *In re Marriott Int'l, Inc., Cust. Data Sec. Breach*
 6 *Litig.*, 440 F. Supp. 3d 447, 461 (D. Md. 2020) (the “growing trend across courts that have
 7 considered this issue is to recognize the lost property value of [PII]”); *In re Yahoo! Cust. Data Sec.*
 8 *Breach Litig.*, No. 16-MD-02752-LHK, 2017 WL 3727318, at *13 (N.D. Cal. Aug. 30, 2017) (injury
 9 in fact for loss of value of their personal information); *In re Anthem, Inc., Data Breach Litig.*, 2016
 10 WL 3029783, at *14 (N.D. Cal. May 17, 2016) (plaintiffs plausibly alleged injury from the loss of
 11 value to PII).

12 Although Plaintiffs maintain that their provision of PII to Zoosk was done so because Zoosk
 13 represented it would protect that PII, and had Plaintiffs known that the protection was inadequate
 14 they would not have provided their PII to Zoosk, crucially Plaintiff Flores-Mendez has alleged
 15 reliance on Zoosk's misrepresentations regarding the adequacy of securing and protecting his PII,
 16 and had he known about these deficiencies, he would not have used Zoosk's services—including
 17 *paying for the subscription service* for which Zoosk charged. SAC ¶¶ 3, 91–97. Inherent in Plaintiff
 18 Flores-Mendez's choice to subscribe to Zoosk was the reputation Zoosk peddled to the community:
 19 that it was secure, and that Plaintiffs and Class Members could entrust their PII to Zoosk without
 20 any concern of nefarious actors obtaining that PII. This is sufficient to allege the requisite loss of
 21 money or property for standing under the UCL as a result of Zoosk's UCL violation. *See e.g., McCoy*
 22 *v. Alphabet, Inc.*, No. 20-cv-05427-SVK, 2021 WL 405816, at *9 (N.D. Cal. Feb. 2, 2021) (citing
 23 *Kwikset Corp.*, 51 Cal.4th at 330, 120 Cal.Rptr.3d 741, 246 P.3d 877 (“finding that the assertion
 24 that a plaintiff ‘would not have bought the product but for’ the unfair business practice is sufficient
 25 to establish UCL standing”)).

26 As demonstrated above, Zoosk's reading of *Kwikset* is incorrect. Mot. at 4 (arguing that
 27 overpayment is required). Further, although Zoosk argues that “Nowhere does Plaintiff Flores-

1 Mendez allege that Zoosk made any representation or promise that its data security standards were
 2 adequate to protect his personal information,” Mot. at 5, Zoosk completely ignores paragraph 35 of
 3 the SAC, which reads in full:

4 Zoosk’s Privacy Policy assures Zoosk customers their PII is secure.
 5 For example, Zoosk states “At Zoosk, we value your privacy and
 6 trust” and “work[s] with third parties *to employ technologies...to ensure the safety and security of your data.*”

7 SAC ¶ 35 (emphasis added). This is not puffery, ambiguous, or otherwise vague—it is a direct
 8 representation and promise to consumers that Zoosk values their privacy and trust, and will “*ensure*”
 9 it is safe and secure. SAC ¶ 35 (emphasis added). Zoosk failed to deliver on this representation and
 10 promise, and Plaintiffs should not be foreclosed from pursuing litigation against Zoosk simply
 11 because Zoosk seeks protection from the representation and promise it made to Plaintiffs and Class
 12 Members before it permitted a data breach that divulged 30 million people’s PII to ShinyHunters,
 13 which was eventually placed on the dark web for sale. Plaintiffs have standing and Zoosk’s motion
 14 to dismiss should be denied.

15 **B. Plaintiffs Sufficiently Plead Both Unlawful and Unfair Conduct.**

16 **1. Zoosk’s Conduct was Unlawful.**

17 Zoosk contends that Plaintiffs have not adequately pled unlawful acts that are a predicate to
 18 a UCL claim. Zoosk argues that “Plaintiffs have not identified which section of the FTC Act they
 19 rely on . . . let alone pled with reasonable particularity facts sufficient to make out a claim under the
 20 FTC Act.” Mot. at 8.

21 Zoosk’s argument fails because it looks only to the specific paragraph in the UCL claim
 22 referencing the FTC Act and ignores the specific allegations in the rest of the Complaint regarding
 23 its violation of the FTC Act. While Zoosk references other discussion of the FTC Act in the
 24 Complaint, it simply elides discussion of those paragraphs. In fact, Plaintiffs allege quite clearly that
 25 Zoosk’s “duty to use reasonable data security measures also arose under Section 5 of the Federal
 26 Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a)[.]” SAC ¶ 79, and that Zoosk breached that
 27 duty by “failing to use reasonable security measures to protect PII and not complying with applicable
 28 industry, federal, and state guidelines and standards.” SAC ¶ 84. Plaintiffs also allege that Zoosk’s

1 “conduct was particularly unreasonable given the nature and amount of customer PII it stored and
2 the foreseeability and resulting consequences of a data breach.” *Id.* Thus, Plaintiffs have clearly
3 identified the provision of law that forms the predicate for their UCL claim.

4 Plaintiffs have also identified the nature of the violation of the FTC Act with requisite
5 particularity. Zoosk cites no law to support its argument that Plaintiffs have not adequately pled a
6 violation of the FTC Act, rather it cites a prepared statement by the Acting Chairman of the Federal
7 Trade Commission indicating that the FTC Act “does not require perfect security” and “the mere
8 fact that a breach occurred does not mean that a company has violated” Section 5. Mot. at 8.

9 But Plaintiffs do not merely allege that Zoosk did not have perfect security. They allege that
10 Zoosk failed to maintain reasonable security measures, failed to detect the unauthorized intrusion
11 into its networks, failed to detect the unauthorized exfiltration, and that the malicious actors who
12 performed these actions did so with relative ease. SAC ¶¶ 4–7, 13–15, 37–46. Plaintiffs also point
13 to FTC guidance that specifically clarifies that Section 5 of the Act is violated by “the unfair
14 practices of failing to use reasonable measures to protect PII by companies such as Defendant,” that
15 “FTC publications and data security breach orders further form the basis of Defendant’s duty,” and
16 that “Plaintiffs and Class members are consumers under the FTC Act,” and that “Defendant violated
17 Section 5 of the FTC Act by failing to use reasonable measures to protect PII and not complying
18 with industry standards.” SAC ¶¶ 81–82 and n.15.²

21 ² See also [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf)
22 [privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-2020-privacy-data-security-update/20210524_privacy_and_data_security_annual_update.pdf) (last
23 accessed August 25, 2021) at 5 (“Since 2002, the FTC has brought 80 cases against companies that
24 have engaged in unfair or deceptive practices involving inadequate protection of consumers’
25 personal data. In 2020, the FTC continued to apply its strengthened orders in data security cases
26 in order to provide protection for consumers and accountability for businesses.”);
27 https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_complaint_7-22-19.pdf (last
28 accessed August 25, 2021) at 11 (alleging that “Defendant engaged in a number of practices that,
taken together, failed to provide reasonable security for the massive quantities of sensitive personal
information stored within Defendant’s computer network. Among other things: A. Defendant failed
to implement reasonable procedures to detect, respond to, and timely correct critical and other high-
risk security vulnerabilities across Defendant’s systems[.]”).

1 This is sufficient to satisfy the UCL’s pleading requirements—particularly here where
 2 information regarding Zoosk’s security measures remains within Zoosk’s knowledge and is the
 3 subject of discovery. The question of whether Zoosk actually violated the FTC Act and therefore
 4 violated the UCL is something that can and should be resolved on summary judgment. *See In re*
 5 *Solara Med. Supplies, LLC Customer Data Sec. Breach Litig.*, No. 3:19-CV-2284-H-KSC, 2020
 6 WL 2214152, at *11 (S.D. Cal. May 7, 2020) (“Defendant’s arguments are better suited for a motion
 7 for summary judgment when the record is more fully developed. As a result, the Court denies
 8 Defendant’s motion to dismiss Plaintiffs’ unlawful UCL claim at this time.”).

9 By contrast, in cases where plaintiffs’ UCL claims have been dismissed for failing to
 10 adequately allege violations of the FTC Act as a predicate unlawful act, the complaints have done
 11 little other than reference the FTC Act and have not explained what violations of the Act occurred.
 12 *See, e.g., Jordan v. Paul Fin., LLC*, 745 F. Supp. 2d 1084, 1098 (N.D. Cal. 2010) (dismissing UCL
 13 claim based on violation of FTC Act because “[t]he FAC does no more than mention the FTC Act;
 14 it makes no effort to tie the FTC Act claim to any of the facts in the complaint.”); *Love v. First*
 15 *Mortg. Corp.*, No. EDCV 08-0060 AG (CTX, 2009 WL 4980323, at *5 (C.D. Cal. Dec. 14, 2009)
 16 (“Although Plaintiffs now allege which section of the FTC Act Defendants allegedly violated,
 17 Plaintiffs still fail to specify factual content [that] allows the court to draw the reasonable inference
 18 that the defendant is liable for the misconduct alleged.” (citation omitted)). Here, where Plaintiffs
 19 have specifically discussed the nature of the violation of the FTC Act and the specific failures that
 20 represent a violation, they have done enough to identify an unlawful act that can serve as predicate
 21 for a UCL claim at the pleading stage.

22 Finally, while Zoosk cites to *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1231 (11th Cir. 2018) for
 23 the principal that Plaintiffs must “allege[] the culpability element of an unfairness-based Section 5
 24 violation, under which a defendant’s conduct must be shown to have violated some independent
 25 constitutional, statutory, or common-law principle,” Mot. at 8–9, that case is inapposite. The *LabMD*
 26 decision found that an FTC Order seeking to enforce Section 5 founded solely on negligence without
 27 applying specific standards was insufficiently vague. *LabMD*, 894 F.3d at 1231–36 (“In sum, the
 28

1 prohibitions contained in cease and desist orders and injunctions must be specific. Otherwise, they
 2 may be unenforceable.”). Here, Plaintiffs do not seek to enforce a vague order of the Federal Trade
 3 Commission against Zoosk. Rather, they contend that Zoosk’s actions were unlawful as they
 4 violated the FTC Act for failing to take adequate measures to protect PII. Moreover, the FTC has
 5 specifically issued more specific orders that clearly delineate appropriate standards in response to
 6 *LabMD*.³ In all events, determination of whether Zoosk actually violated the FTC Act by its alleged
 7 failure to adequately protect PII are better reserved for summary judgment, as indicated above.

8 2. Zoosk’s Conduct was Unfair

9 Zoosk also contends that Plaintiff has failed to adequately allege that its conduct was unfair
 10 as that term is used in the UCL. Mot. at 9–11. However, Plaintiffs’ allegations in fact are sufficient
 11 under both the balancing test and tethering test for unfair competition.

12 a. Plaintiffs have sufficiently tethered their UCL allegations to a 13 violation of statutory provisions

14 “[W]ith respect to the tethering test, parties need not show immoral, unethical, oppressive,
 15 unscrupulous, or substantially injurious conduct in order to move forward with a UCL claim.” *In re*
 16 *Anthem*, 162 F. Supp. 3d at 990 (“The tethering test only requires parties to show that the public
 17 policy which is a predicate to a consumer unfair competition action under the ‘unfair’ prong of the
 18 UCL [is] tethered to specific constitutional, statutory, or regulatory provisions.” *Id.* (citation and
 19 quotation marks omitted). Courts in this district have found that “various California statutes . . .
 20 reflect California’s public policy of protecting customer data.” *Id.*; *see also In re Adobe Sys., Inc.*
 21 *Priv. Litig.*, 66 F. Supp. 3d 1197, 1227 (N.D. Cal. 2014) (holding same); *In re Yahoo!*, 2017 WL
 22 3727318, at *24 (holding same); *In re Zoom Video Commc’ns Inc. Priv. Litig.*, No. 20-CV-02155-
 23 LHK, 2021 WL 930623, at *23 (N.D. Cal. Mar. 11, 2021). Plaintiffs here have therefore alleged

24 ³ See [https://www.ftc.gov/news-events/blogs/business-blog/2020/01/new-improved-ftc-data-](https://www.ftc.gov/news-events/blogs/business-blog/2020/01/new-improved-ftc-data-security-orders-better-guidance)
 25 [security-orders-better-guidance](https://www.ftc.gov/news-events/blogs/business-blog/2020/01/new-improved-ftc-data-security-orders-better-guidance) (last accessed August 25, 2021) (“As part of the FTC’s Hearings on
 26 Competition and Consumer Protection in the 21st Century, we held a hearing in *December* 2018
 27 that specifically considered how we might improve our data security orders. We were also mindful
 28 of the 11th Circuit’s 2018 *LabMD* decision, which struck down an FTC data security order as
 unenforceably vague. Based on this learning, in 2019 the FTC made significant improvements to
 its data security orders.”)

1 unfair conduct by Zoosk because its alleged conduct allowing a data breach that exposed consumer
2 data is tethered directly to California’s policies of protecting consumer data.

3 Finally, Zoosk argues that Plaintiffs cite to no statutes other than the FTC act and rely on
4 *Adobe* for the principal that Plaintiffs must “show that the effects of [Zoosk’s] conduct are
5 comparable to or the same as a violation of the law, or otherwise significantly threaten or harm
6 competition.” Mot. at 10. But *Adobe* specifically holds that “Plaintiffs do not need to plead any
7 direct violations of a statute to bring a claim under the UCL’s unfair prong.” *In re Adobe*, 66 F.
8 Supp. 3d at 1227. The *Adobe* Court in fact concluded that Plaintiff’s UCL claims based on a data
9 breach were tethered to California’s policies because “the OPPA, the IPA, and the CRA collectively
10 reflect California’s public policy of ‘protecting customer data’” and “California legislative intent is
11 clear on this point.” *Id.*

12
13 **b. Plaintiffs have alleged that Zoosk acted unfairly under the
balancing test**

14 Zoosk argues that even though Plaintiffs have plead that Zoosk engaged in unfair conduct,
15 it did not rise to the level of immoral, unethical, oppressive, unscrupulous and/or substantially
16 injurious” conduct. Mot. at 11. But, contrary to Zoosk’s suggestion, “[n]one of the three tests for
17 unfairness require plaintiffs to plead that defendants acted in an immoral, unethical, oppressive, or
18 unscrupulous manner.” *In re Anthem*, 162 F. Supp. 3d at 990. Rather, “an unfair business practice
19 occurs when it offends an established public policy *or* when the practice is immoral, unethical,
20 oppressive, unscrupulous or substantially injurious to consumers.” *Id.* (quoting *Bardin v.*
21 *Daimlerchrysler Corp.*, 136 Cal.App.4th 1255 (Ct. App. 2006) (emphasis in original). Here, as
22 discussed above, Zoosk clearly has offended California’s public policy of protecting consumer data.

23 Likewise, Courts in this District have routinely found that a violation of the unfairness prong
24 of the UCL occurs when a company violates its own privacy policies and allows a breach as alleged
25 here, SAC ¶¶ 33–35 (detailing Zoosk’s privacy policy’s assurances that consumer data will be
26 protected). *See Svenson v. Google, Inc.*, 2015 WL 1503429, at *10 (N.D. Cal. Apr. 1, 2015) (finding
27 plaintiffs sufficiently alleged violation of UCL’s unfair prong where plaintiffs alleged that “Google
28

violated its own privacy policies” by failing to safeguard the plaintiff’s data). *See also Cappello v. Walmart Inc.*, 394 F. Supp. 3d 1015, 1024 (N.D. Cal. 2019) (Assuming Walmart did systematically breach its Privacy Policy given the ambiguity outlined above, this practice contravenes California’s well-established public policy of protecting consumer data); *In re Yahoo!*, 2017 WL 3727318, at *24 (finding violation of UCL sufficiently alleged because “Plaintiffs allege that Defendants promised in their Privacy Policy to protect their customers’ data, but that Defendants knowingly failed to employ adequate safeguards to protect their customers’ data”).

Zoosk next argues that the Court must “weigh the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” Mot. at 11 (quoting *In re Adobe*, 66 F. Supp. 3d at 1227). But, the *Adobe* Court found that Plaintiff’s data breach allegations were sufficient because the complaint indicated that the plaintiffs were injured by “plac[ing] Plaintiffs at a substantial risk of future harm and caus[ing] Plaintiffs to overpay for Adobe products and services.” *Id.* Here too, Plaintiffs allege that they were placed at harm because one of the plaintiffs paid for the service, see SAC ¶ 3, and because they are subject to heightened risk of their information being used by hackers and must engage in heightened surveillance of their accounts, SAC ¶ 53.

Moreover, the actual balancing of harm versus utility is not done on a motion to dismiss. Rather, “[w]hether Defendants’ public policy violation is outweighed by the utility of their conduct under the balancing test is a question to be resolved at a later stage in this litigation.” *In re Anthem*, 162 F. Supp. at 990.

Accordingly, Plaintiffs’ UCL claims should not be dismissed because Plaintiffs have adequately allege both unlawful conduct and unfair conduct.

C. Plaintiff Flores-Mendez is Entitled to Monetary and Plaintiffs Are Entitled to Injunctive Relief

Zoosk attempts to litigate summary judgment and class certification at the dismissal stage, and its arguments concerning Plaintiffs’ entitlement to damages is not only premature, but incorrect. Under the UCL, a plaintiff is entitled to restitutionary and injunctive relief. *Fresno Motors, LLC v. Mercedes Benz USA, LLC*, 771 F.3d 1119, 1135 (9th Cir. 2014). The monetary recovery can be from “profits unfairly obtained to the extent that th[o]se profits represent monies given to the defendant or benefits

1 in which the plaintiff has an ownership interest.” *In re Yahoo!*, 2017 WL 3727318, at *31.

2 **1. Monetary Relief is Proper**

3 Zoosk misconstrues the profits theory; although the entire class should be entitled to
 4 monetary relief for the reasons stated above, at bottom the Subscription Subclass is entitled to
 5 restitutionary disgorgement to the extent that Zoosk *did not spend money on adequate security* that
 6 it otherwise should have. Put differently, Zoosk profited by *not spending money* on adequate security
 7 practices. This is money that Zoosk improperly saved rather than spent to adequately secure
 8 Plaintiffs’ and Class Members’ PII, leaving that PII vulnerable and available for nefarious actors to
 9 steal, exploit, and eventually offer for sale on the dark web.

10 **2. Injunctive Relief is Proper**

11 Plaintiffs are also entitled to injunctive relief. Zoosk conclusively argues that the unlawful
 12 activity “occurred in the past,” and there are no allegations that the behavior is ongoing or will recur.
 13 Mot. at 17. Such a standard is impossible, but the Court need look no further than Zoosk’s own
 14 pleadings in this case to surmise that prospective injunctive relief is appropriate: despite nefarious
 15 actors infiltrating Zoosk’s inadequately secured computer systems, exfiltrating 30 million users’ PII,
 16 offering that information for sale on the dark web, and Zoosk only learning of the breach because
 17 of this publication, Zoosk denies any culpability. Yet, Zoosk still maintains the PII of those 30
 18 million people, and injunctive relief is appropriate to require Zoosk to not only enjoin Zoosk’s
 19 deceptive conduct and implement adequate information security policies and practices, but also to
 20 require Zoosk to cease collecting and indeed delete Plaintiffs’ and Class Members’ PII. Plaintiffs
 21 have an interest in the PII they provided to Zoosk, and Zoosk should not skate from culpability
 22 based on its untested assertions that any issues have been resolved. Even still, without an injunction,
 23 Zoosk is free to roll back its practices, save money, and enjoy higher profits without any regard for
 24 the security of Plaintiffs’ and Class Members’ PII.

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1 **IV. CONCLUSION**

2 For the reasons stated herein, the Court should deny Zoosk's Motions to Dismiss. In the
3 event the Court finds any merit to Zoosk's arguments and grants dismissal for any cause of action,
4 Plaintiffs respectfully request leave to amend.

5 Dated: August 25, 2021

/s/ Kiley Lynn Grombacher

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